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# Rule against Perpetuities: The Second Restatement Adopts Wait and See

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## COMMENTS

### RULE AGAINST PERPETUITIES: THE SECOND RESTATEMENT ADOPTS WAIT AND SEE

#### INTRODUCTION

When the second Restatement of Property is issued, it will recommend that American courts use the wait-and-see approach in their application of the Rule Against Perpetuities to donative transfer instruments.<sup>1</sup> The new policy represents a radical departure from the majority view that the Rule sets a strict social limitation on the disposition of property that the courts are duty-bound to apply.<sup>2</sup> This limitation was expressed by John Chipman Gray as the mechanistic formula: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."<sup>3</sup>

The injection of wait and see is in a small sense revolutionary because it is the beginning of an implicit recharacterization of the Rule Against Perpetuities from a rule of rigid limitation to a rule of construction. While wait and see purports to have

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1. On May 18, 1979 the American Law Institute approved the policy contained in a second draft of what will comprise the second Restatement of the Law of Property on donative transfers. *RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS* (Tent. Draft No. 2, 1979) [hereinafter cited as Draft]. The first draft adopting the wait-and-see approach was the subject of eloquent debate at the May, 1978 meeting, with opposition to the new view led by no less an authority than Richard R. Powell, Reporter in 1944 for the first *AMERICAN LAW INSTITUTE, RESTATEMENT OF PROPERTY* (1944) [hereinafter cited as *RESTATEMENT*]. Objection to wait and see focused on the lack of statutory and judicial authority for adopting the new view and general difficulties with the new policy.

2. In most states the rule still is usually applied in the manner John Chipman Gray recommended:

The Rule Against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied.

J. GRAY, *THE RULE AGAINST PERPETUITIES* § 629 (4th ed. 1942).

3. *Id.* § 201. It has been suggested that the addition of the words "generally speaking" at the beginning, as well as putting the word vest in quotation marks, would more accurately reflect the formulation actually used by the courts. Leach, *Perpetuities in a Nutshell*, 51 *HARV. L. REV.* 63, 639 (1938).

a relatively minor substantive influence, its acceptance is in fact an erosion of one of the most entrenched rules of law for the disposition of property.

This comment has a dual thesis: first, recharacterization of the Rule is being permitted without adequate justification; second, if the Rule is to be liberalized, *cy pres* is a better alternative than wait and see because it yields an immediate decision on the validity of an instrument. The comment will define the alternatives and show how the one to be incorporated in the second Restatement—wait and see—will work. It will suggest some alternate measures that could have made the Rule less harsh without changing its basic character. Justifications for the new policy will be examined and refuted. Finally, treatment of the Rule Against Perpetuities in California, and the impact of the new policy on a state that already has a modifying but conflicting statute, will be discussed. The comment concludes that wait and see is an unsatisfactory half-way measure which will create more problems than it solves. If the time has come to change the Rule Against Perpetuities into a rule of construction, that fact should be acknowledged and the best possible construction—*cy pres*—should be adopted.

### THREE ALTERNATIVES DEFINED

#### *The Traditional View*

The common-law approach to the Rule Against Perpetuities heretofore adhered to by the majority of courts in America, applies the Rule by considering facts as they exist when the period of the Rule begins to run, as at the delivery of a deed or death of the testator. When an instrument is contested, the court looks to the events that might conceivably occur, or could have occurred, in determining if the grant fits within the time limits for vesting set by the Rule. This is called the "possibilities" or "what-might-happen" approach.

The results of strict application of the possibilities approach occasionally can be harsh. There is little argument that anachronisms such as "the fertile octogenarian" or "the unborn widow" are problems that should be eliminated. More disagreement survives as to how, or even if, a more basic lack of conformation to the Rule's limitations should be ameliorated.

The condition precedent of age contingency, class gifts, and the vesting of executory interests fall into this latter category.<sup>4</sup>

### *The Wait-and-See Approach*

Under wait and see, the court will consider events as they have actually occurred since the time of the disposition in determining if an interest can possibly vest or will become certain to vest within the period of the Rule.<sup>5</sup> Thus, the decision on validity can be postponed for as long as the duration of the perpetuity period. Statutes in five states use a wait-and-see approach in determining the validity of non-vested interests,<sup>6</sup> while five apply wait and see until the expiration of life estates in persons who are living when the Rule begins to run.<sup>7</sup>

### *The Cy Pres Approach*

The *cy pres* approach, which has been commonly employed in the past to reform charitable gifts, allows a court to rewrite an invalid disposition to effectuate a donor's intent as closely as possible within the conformations of the Rule. The major advantage of *cy pres* is that it allows an immediate decision on disposition of the property in question. The principal disadvantage is that courts traditionally have been reluctant to assume the role of the drafter in ruling upon a disposition.

This approach also has been adopted by framers of the second Restatement, but only as an adjunct to be used in certain circumstances where wait and see alone leaves an unclear result. Ten statutes adopt *cy pres* to reform violations of the Rule<sup>8</sup> and five use its principles to cut invalid age contingencies

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4. See notes 17-32 and accompanying text *infra*.

5. AMERICAN BAR ASSOCIATION, PERPETUITY LEGISLATION HANDBOOK 3 (3d ed. 1967).

6. KY. REV. STAT. ANN. § 381.216 (Baldwin 1970)(adopted 1960); OHIO REV. CODE ANN. § 2131.08(c) (Page 1976)(adopted 1967); PA. STAT. ANN. tit. 20 § 6104 (Purdon 1975)(adopted 1947); VT. STAT. ANN. tit. 27, § 501 (1975)(adopted 1957); WASH. REV. CODE ANN. § 11.98.010 (1967)(adopted 1959). In addition, England, New Zealand, Western Australia and Ontario have enacted wait-and-see statutes. See AMERICAN BAR ASSOCIATION, *supra* note 5, at 5.

7. CONN. GEN. STAT. ANN. § 45-95 (West 1960)(adopted 1955); FLA. STAT. ANN. § 689.22(2)(a) (West Supp. 1979)(effective 1979); ME. REV. STAT. ANN. tit. 33, § 101 (1978)(adopted 1955); MD. EST. & TRUSTS CODE ANN. § 11-103a (1969)(adopted 1960); MASS. GEN. LAWS ANN. ch. 184A, § 1 (West 1977)(adopted 1954).

8. CAL. CIV. CODE § 715.5 (West Supp. 1978)(adopted 1963); IDAHO CODE § 55-111 (1974)(adopted 1957); KY. REV. STAT. § 381.216 (1970)(adopted 1960); MO. REV. STAT. § 442.555 (Supp. 1978)(adopted 1965); OHIO REV. CODE ANN. § 2131.08(c) (Page 1976)(adopted 1967); OKLA. STAT. ANN. tit. 60, §§ 75-78 (West Cum. Supp. 1978-1979)

down to twenty-one years.<sup>9</sup>

## HOW WAIT AND SEE WILL WORK

### *The New Sections*

Restatement of the Law Second, Property, Donative Transfers, Tentative Draft No. 2 (*Draft*) incorporates the wait-and-see approach in section 1.4, providing: "[A] donative transfer of an interest in property fails, if the interest does not vest . . . within the period of the rule against perpetuities."<sup>10</sup>

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(adopted 1971); PA. STAT. ANN. tit. 20, § 6105 (Purdon 1975)(adopted 1972); TEX. REV. CIV. STAT. ANN. art. 1291(b) (Vernon Pamph. Supp. 1963-1978)(adopted 1969); VT. STAT. ANN. tit. 27, § 501 (1975)(adopted 1957); WASH. REV. CODE § 11.98.030 (1965)(effective 1967).

9. FLA. STAT. ANN. § 689.22(4) (West Supp. 1978)(effective 1979); ILL. ANN. STAT. ch. 30, § 194(c) (Smith-Hurd Supp. 1979)(adopted 1969); MASS. GEN. LAWS ANN. ch. 184A, § 2 (West 1977)(adopted 1954); ME. REV. STAT. ANN. tit. 33, § 102 (1978)(adopted 1955); N.Y. EST., POWERS & TRUSTS LAW § 9-1.2 (McKinney 1967)(adopted 1967).

10. *Draft, supra* note 1, at 66. Section 1.4 of the Draft is to be used in conjunction with § 1.5, discussed in the text accompanying notes 13-15 *infra*, and § 1.1, which provides:

The period of the rule against perpetuities in donative transfers is twenty-one years after lives in being (the measuring lives) when the period of the rule begins to run.

*Id.* at 20; § 1.2 which provides:

The period of the rule against perpetuities begins to run in a donative transfer with respect to a non-vested interest in property as of the date when no person, acting alone, has a power currently exercisable to become the unqualified beneficial owner of all beneficial rights in the property in which the non-vested interest exists.

*Id.* at 27; and § 1.3 which provides for the selection of measuring lives:

(1) If an examination of the situation with respect to a donative transfer as of the time the period of the rule against perpetuities begins to run reveals a life or lives in being within 21 years after whose deaths the non-vested interest in question will necessarily vest, if it ever vests, such life or lives are the measuring lives for purposes of the rule against perpetuities so far as such non-vested interest is concerned and such non-vested interest cannot fail under the rule. A provision that terminates a non-vested interest if it has not vested within 21 years after the death of the survivor of a reasonable number of persons named in the instrument of transfer and in being when the period of the rule begins to run is within this subsection.

(2) If no measuring life with respect to a donative transfer is produced under subsection 1, the measuring lives for purposes of the rule against perpetuities as applied to the non-vested interest in question are:

a. The transferor if the period of the rule begins to run in the transferor's lifetime; and

b. those individuals alive when the period of the rule begins to run, if reasonable in number, who have beneficial interests vested or contingent in the property in which the non-vested interest in question exists and the parents and grandparents alive

This simple rule is a major departure from the traditional notion that if an interest is not certain to vest within the period of the Rule Against Perpetuities, it is immediately void.<sup>11</sup>

A property interest is non-vested if it is subject to an unfulfilled condition precedent that may be the occurrence or non-occurrence of some event.<sup>12</sup> This can be the birth of the individual to whom the interest is given, the attainment of a particular age by a beneficiary, or any condition imposed by the transferor upon those to whom a remainder or executory interest will devolve.

To be fairly evaluated, this new section should be considered in conjunction with the subsequent section 1.5, which adds a *cy pres* provision to aid courts in applying wait and see:

If under a donative transfer an interest in property fails because it does not vest or cannot vest within the period of the rule against perpetuities, the transferred property [may] be disposed of in the manner which most closely effectuates the transferor's manifested plan of distribution, which is within the limits of the Rule Against Perpetuities.<sup>13</sup>

Use of the word "may"<sup>14</sup> in the section would seem to allow fairly liberal discretion in its application. To effectuate the transferor's manifested plan of distribution, a court may sim-

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when the period of the rule begins to run of all beneficiaries of the property in which the non-vested interest exists; and

[section (2) c. was deleted at the meeting of the American Law Institute, May 18, 1979]

d. the donee of a nonfiduciary power of appointment alive when the period of the rule begins to run if the exercise of such power could affect the non-vested interest in question.

A child in gestation when the period of the rule begins to run who is later born alive is treated as a life in being at the time the period of the rule begins and, hence, may be a measuring life.

*Id.* at 48-49. Section 1.4 does not apply to charitable gifts. These are subject to § 1.6, which provides:

If under a donative transfer an interest in property transferred to a charity does not vest within the period of the rule against perpetuities, it fails unless it would divest a valid interest in another charity, in which case it does not fail on the ground of the rule against perpetuities, even though the divestiture does not occur within the period of the rule.

*Id.* at 127.

11. RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS (Tent. Draft No.1, March 15, 1978) 65.

12. Draft, *supra* note 1, at 66.

13. *Id.* at 108.

14. "May" was substituted for "shall" at the meeting of the American Law Institute, May 18, 1979. *Id.*

ply eliminate interests that fail while allowing the remaining ones to take effect, create interests resembling the ones that failed, or allow otherwise valid interests to fail along with one that has infected the entire transfer.<sup>15</sup>

Under the new wait-and-see approach, those who interpret an instrument must determine *if* an interest cannot vest within the period, and to do this, they must wait and see whether the condition precedent will be fulfilled within the period of the Rule. Only if it can be determined on the date the period of the Rule begins to run that it is impossible under all circumstances for the interest to vest in time, will it fail under the new policy as abruptly as it would have under the old.<sup>16</sup> Thus, wait and see breathes new life into interests that traditionally would have failed.

### *The New Approach Applied to Old Problems*

*Age contingency and class gifts.* The condition precedent of age contingency and the class gift are often interconnected within the same disposition; for that reason they will be treated together here. A transfer in trust with income to A for life and distribution of the corpus to his children when the youngest reaches twenty-five, for example, could fail under the possibilities approach because it is possible for A to have children who will not reach the required age within twenty-one years of A's death. Similarly, the same class gift to grandchildren or issue might be invalid because it is possible for new members of the class to be born at a time when fulfillment of the condition within the period of the Rule is impossible.

The wait-and-see approach will not invalidate such interests unless they in fact vest too remotely.<sup>17</sup> Under the new rule, the interests capable of vesting in time will not fail even if A has children, if in fact all of A's children die before age twenty-five within twenty-one years after the survivor of the measuring lives. In applying section 1.5 to those class members whose interests fail after the wait-and-see period, a court will have to look to the overall objectives of the transferor in deciding whether 1) to allow the failed interest to defeat the interests of all class members (the same result as under the possibilities

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15. *Id.* at 109.

16. *Id.* at 96.

17. *Id.* at 76-78.

approach), or 2) to imply an interest in such members at the age they will have attained at that date.<sup>18</sup>

*Executory interests.* Non-vested executory interests that might possibly vest beyond the period of the Rule fail immediately under the possibilities approach. Wait and see will give them the opportunity to become vested within the period of the Rule. In *O*'s deed of Blackacre "to A and his heirs as long as Blackacre is used for residential purposes, then to B and his heirs,"<sup>19</sup> *B*'s executory interest fails under the possibilities approach because the cessation of residential use might not occur until more than twenty-one years after the death of the survivor of *O*, *A*, and *B*, the measuring lives. Under the new rule, *B*'s interest will not fail unless residential use continues beyond twenty-one years after the death of the survivor of *O*, *A*, and *B*. If *B*'s interest does fail after the waiting period, application of the *cy pres* provision of section 1.5 would leave *A*'s interest a determinable fee simple with a possibility of reverter in any successors or devisees of *O*.

The same result to *B*—but different overall consequences—will obtain where *B* has an executory interest attached to an initial fee simple absolute, as in a deed of Blackacre "to A and his heirs but if A or his heirs or assigns ever use Blackacre for other than residential purposes, Blackacre shall pass to B and his heirs."<sup>20</sup> Should *B*'s interest fail to vest, the words "to B and his heirs" are stricken from the grant, leaving an incomplete thought. Applying section 1.5, the presumption is made "that *O* intended A's interest to be subject to termination for non-residential use if, and only if, the interest in B does not fail," so *A* is left with a fee simple absolute.<sup>21</sup> The result of wait and see in this case is interesting in that it effectuates *O*'s desired use of Blackacre for at least a measuring life and twenty-one years, whether or not *B*'s executory interest ever vests. Without wait and see, *A* receives a freely alienable interest the moment *B*'s interest is declared invalid.

*The fertile octogenarian.* The assumption under the traditional approach, that an aged person could have an additional child who will not reach the specified age within the period of the Rule, can invalidate a class interest. Under wait and see,

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18. *Id.* at 113.

19. *Id.* at 84.

20. *Id.*

21. *Id.* at 111.



an interest that depends on the birth of no additional children will fail only if in fact another child is born within the period of the Rule and actually lives longer than twenty-one years after the death of those designated to measure the period.<sup>22</sup>

*The unborn widow.* Where the unfulfilled condition precedent to an interest in property is the survivorship of a life beneficiary and then his widow, it is possible that the beneficiary may marry someone who was not alive at the time his life interest was created. Because this widow could live more than twenty-one years after the death of the survivor of the measuring lives, the non-vested interest in the property can fail. Under the wait-and-see approach the interest will fail only if in fact it does not vest within the period of the Rule.<sup>23</sup>

#### MODIFICATIONS COULD HAVE LEFT THE RULE UNSCATHED

The Rule's least productive quirks have been or could have been handled with less drastic and more timely measures than wait and see. The conditions precedent of survival to the probate of a will or to the administration of an estate<sup>24</sup> are examples of unforeseen imperfections in an instrument that the courts have corrected by using a rule of construction that required survival for only a reasonable time.<sup>25</sup> Similar treatment should have been accorded the cases of the fertile octogenarian and unborn widow.

#### *The Fertile Octogenarian*

Using wait and see to solve the problem of the fertile octogenarian unduly postpones a relatively minor decision. The matter is better solved by accepting evidence of fertility in the present, rather than waiting out old age to see if in fact child-bearing is possible. In cases where the parent in question is obviously incapable of having more children, the Restatement

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22. *Id.* at 74-75.

23. *Id.* at 75.

24. Theoretically these could occur beyond 21 years.

25. Exceptions to this constructional preference for validity can be found only among early cases. The most recent among those is a 1938 California appellate decision, *In re Campbell's Estate*, 28 Cal. App. 2d 102, 82 P.2d 22 (1938), which found void a gift to four officers of a fraternal organization because it was possible that distribution of the estate might not occur within the period of the Rule. Condition of survival to the probate of a will would not void an instrument in California today because court attitudes have changed, and CAL. CIV. CODE § 715.5 (West Supp. 1978) would permit reformation.

recommends a rule of construction to resolve ambiguity as to whether the conveyor contemplated birth of additional children to the individual. The rationale for the use of such interpretive construction is that it "manifests the desire of judges to minimize the harshness of results sometimes caused by a literal application of the rule . . ." as it is stated.<sup>26</sup> The excuse for retaining the anachronism is that courts are reluctant "to engage in the decision of borderline cases, and to make public inquiry into the possibility of conception . . ."<sup>27</sup> Such squeamishness is outdated by improvements in medical technology. The issue could have been simply resolved with a recommendation that capability of having children be treated as a presumption of fact, rebuttable by relevant evidence concerning the parent.<sup>28</sup>

### *The Unborn Widow*

The *Draft* itself acknowledges that "[f]ew interests have failed in recent years on the basis of the 'unborn widow' possibility."<sup>29</sup> If this defect in a conveyance is actually detected,<sup>30</sup> courts can determine that the testator intended a present wife when he used the term "wife" or "widow". The first Restatement already allows the legally more effective construction where there is ambiguity in an instrument.<sup>31</sup> The second Restatement should have included a modification urging courts to use such an interpretation without resorting to a more sweeping change.<sup>32</sup>

There is little argument that the fertile octogenarian and the unborn widow have been unwelcome warts upon the Rule Against Perpetuities. Using them as excuse for major surgery, however, is unjustified.

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26. RESTATEMENT, *supra* note 1, at 2210.

27. *Id.* at 2208.

28. *See id.* § 377.

29. *Draft, supra* note 1, at 101.

30. The *Draft* points out the probability that often the defect goes unnoticed (citing *Thompson v. Bray*, 313 Mass. 717, 49 N.E.2d 228 (1943) *Draft, supra* note 1, at 101.

31. RESTATEMENT, *supra* note 1, at 2197-98.

32. States that are not fully satisfied by such a recommendation can enact a more definite statutory solution. This has been done in CAL. CIV. CODE § 715.7 (West Supp. 1979)(adopted 1963); FLA. STAT. ANN. § 689.22(5)(b) (West Supp. 1978)(effective 1979); and, N.Y. EST., POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1967)(adopted 1960).

## PURPORTED JUSTIFICATIONS FOR CHANGE

To justify the Rule's restructure, the *Draft* proffers three arguments. First, it contends that wait and see is in one sense a mere expansion of interpretive technique already employed by the courts. It will be shown that such extrapolation is inaccurate. Second, the new approach is offered as an equalization measure to poorly drafted documents, allowing them the same results that can be obtained by instruments that have been more carefully conceived. However, poor draftsmanship calls for stricter, not looser enforcement of the Rule. Third, the *Draft* claims that the Rule's historical development justifies prolongation of perpetuities. This premise is unfounded. Examination of the Rule's origins indicates that perpetuities were initially permitted only with the intention that they be strictly limited. In addition to such erroneous rationalization for adopting wait and see, the *Draft* failed to consider the social implications of the new approach.

*Established Doctrines Look to the Past, Not the Future*

*The doctrine of separability.* Improper dispositions do not always invalidate an entire instrument. Under the doctrine of separability, incorporated in the Restatement, courts have traditionally upheld dispositions that are valid where they can be separated from those that are not.<sup>33</sup> This is based upon a desire to effectuate a donor's intent to the greatest extent possible within the limits of the law, and to cut it short where those limits are exceeded. The doctrine separates language relating to distinct subject matters, separate shares or alternative conditions. Where alternative contingencies are stated, subjecting a non-vested interest in property to two or more conditions precedent one of which is certain to be fulfilled within the period of the Rule, the courts save the interest if it is the legitimate condition that actually occurs. For example, where *B* is given an executory interest in property contingent upon either *A* having no children, or *A*'s children dying before they reach the age of twenty-five, the first condition must occur within the period of the Rule. Courts generally hold, therefore, that the first of these interests is valid even though the second one is

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33. RESTATEMENT, *supra* note 1, § 376, which provides: "The validity of each separate limitation is determined separately under the rule against perpetuities." See also *id.* at 2199-207.

not. The result is that *B*'s interest will vest if *A* dies childless, but fail if *A* has children.<sup>34</sup>

The *Draft* calls this "a wait-and-see approach built into the what-might-happen approach."<sup>35</sup> This corollary is somewhat farfetched, as the courts are merely saving interests based upon contingencies certain to be fulfilled within the period of the Rule by cutting out invalid dispositions. In other words, good language is saved while the bad is stricken. There is no waiting to see if an invalid interest will become valid at some future time.

Under section 1.4, an interest subject to alternative conditions precedent does not fail if either condition occurs within the period of the Rule. For that matter, even where the contingency is stated as a single condition precedent, providing vesting in *B* "if no child of *A* attains the age of 25 years . . .," the unexpressed, legitimate condition—if *A* dies childless—is taken to be implicit.<sup>36</sup> Thus, where the disposition would have fallen under the possibilities approach for its total impropriety, good language is implied under the new rule, and *B*'s interest is saved if *A* dies childless or *A*'s children die within twenty-one years.

It is unclear whether wait and see will replace the well-established doctrine of separability, or if the two approaches will somehow be intertwined. It is conceivable that a valid interest could be separated immediately from others that require waiting. Where this possibility exists, it might be necessary to choose between the interpretive techniques. Immediate separation could prejudice a later distribution; yet, a late decision on interests that would have been saved at a timely date under the old approach seems unfair.

*The second look.* The *Draft* takes similar liberties in the area of interests created by, or that take in default of, the exercise of a power of appointment. When a power of appointment is exercised during the running of the period of the Rule,<sup>37</sup> period of the Rule began to run,<sup>37</sup> courts have taken a "second look" at the period since the power's creation, to determine on

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34. *Draft*, *supra* note 1, at 86.

35. *Id.* at 85.

36. *Id.* at 85-87.

37. This is the case where it is a general power to appoint by will, or a limited power to appoint by deed or by will, in contrast to instances where interests in property are created by, or take in default of, the exercise of a power of appointment thus beginning the running of the period of the Rule. *Draft*, *supra* note 1, at 81.

the basis of facts known at the time the power is or should be exercised, if a violation of the Rule might occur. The *Draft* utilizes this authority to shift the "second look" into the future:

The rule of this section, which adopts a full wait-and-see rule, incorporates the limited wait-and-see rule of the "second look" and goes beyond it to permit the wait-and-see to continue after the date the power is exercised or is no longer exercisable.<sup>38</sup>

This is a tenuous extrapolation of the "second look." Sensibly taking into account what in fact has happened is a far cry from waiting to see if more conditions can be fulfilled within the perpetuity period. This jump from "second look" to wait and see moves from the past, before the very question of validity arose, to the future, where it will henceforth be resolved.

There is no germ of wait and see to be found in the common-law doctrine of separability and the "second look." In fact, an examination of the cases involving these doctrines reveals a consistent rejection by the courts of wait and see.<sup>39</sup>

### *Draftsmanship Difficulties Argue for a Strong Rule*

One of the major justifications for adopting the wait-and-see approach is that it will merely compensate for poor draftsmanship.<sup>40</sup> Clients without expert attorneys can thus obtain an equal chance to dispose of their estates according to their desires—as if in answer to the criticism put forth by W. Barton Leach in 1952:

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38. *Id.*

39. This rejection and the possibility of a new trend in California is discussed in text accompanying notes 65-75. See *In re Kober Trust Fund*, 26 Cal. App. 3d 265, 103 Cal. Rptr. 1 (1972); *Estate of Gump*, 16 Cal. 2d 535, 107 P.2d 17 (1942); *Sheean v. Michel*, 6 Cal. 2d 324, 57 P.2d 127 (1936); *Estate of Troy*, 214 Cal. 53, 3 P.2d 930 (1931); *Estate of Steele*, 124 Cal. 533, 57 P. 564 (1899); *Connecticut Bank and Trust Company v. Brody*, 174 Conn. 616, 392 A.2d 445 (1978); and, *Hagemann v. National Bank & Trust Co.*, 218 Va. 333, 237 S.E.2d 388 (1977). In addition, see *RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS*, 142-43 app. (Tent. Draft No.1, 1978), where R.R. Powell notes that he has compiled a list of 44 cases in support of the possibilities approach, and refutes any suggestion that wait and see has gained court support. Thorough examination of these could yield a comment equal in length to this one.

40. The what-might-happen approach is nothing more than a trap that is easily avoided by appropriate drafting. The adoption of the wait-and-see approach in this Restatement is largely motivated by the equality of treatment that is produced by placing the validity of all non-vested interests on the same plane, whether the interest is created by a skilled draftsman or one not so skilled.

*Draft*, *supra* note 1, at 17.

I do not recall a single twentieth-century case, English or American, in which the will or trust could not have been so drafted as to carry out the client's essential desires within the limits of the Rule. This means that our courts in applying the Rule are not protecting the public welfare against the predatory rich but are imposing forfeitures upon some beneficiaries and awarding windfalls to others because some member of the legal profession has been inept.<sup>41</sup>

But this claim does not withstand scrutiny. Poor draftsmanship can also be argued as a reason for urging retention of strict enforcement of the Rule. There are two contraindications to the *Draft's* position.

*Quality of draftsmanship.* First, why encourage poor workmanship? The problem seems to be moot in California thanks to statutory reform and a liberal judicial attitude.<sup>42</sup> However, the discussion has not been entirely closed—nor should it be. Disapproval of the liberal position came from the eminent authority, Richard R. Powell, who commented, "Today, I would say that it is almost impossible in California for a lawyer to draw an invalid will. . . . [This is undesirable because] it encourages sloppy work."<sup>43</sup>

Changing the Rule in order to alleviate the misfortunes of the victims of inexperienced drafting is a more drastic innovation in the law than it appears to be. In every other area, a client stands to win or lose on the basis of a combination of the merits of his case and its development by his attorney. If accommodation is made for a group that usually can well afford to seek the best legal help available, logic would allow every person who loses a case of any kind in the future to argue "poor representation" on appeal. At present this argument rarely succeeds precisely because of the policy that inadequate preparation should be discouraged.

*Manipulation of the law.* Providing a loophole for saving a faulty instrument can only encourage attorneys to manipulate the law in order to achieve the sometimes less than best motives of their clients. It is only when an instrument is challenged that it is defeated. Presumably, a clever draftsman can

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41. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror* 65 HARV. L. REV. 721, 739-45 (1952).

42. See discussion of perpetuities law in California in text accompanying notes 76-87 *infra*.

43. Interview with Richard R. Powell in Palo Alto, Cal. (Nov. 17, 1978).

write in dispositive provisions that, if uncontested, would defeat the Rule, but nevertheless, even if it is contested, secure the Rule's full period for delaying distribution of corpus by counting on the future availability of liberal interpretation. One result could be an increased number of suits brought to challenge such documents.<sup>44</sup>

Such gambling with the Rule is not a novel notion. It was attempted in *Hagemann v. National Bank & Trust Co.*<sup>45</sup> There, the Virginia Supreme Court specifically rejected wait and see in favor of strict application of the common-law approach. The court was antagonized by a disposition forbidding alienation of an estate until the testatrix's youngest grandchild reached twenty-five, with a parallel savings clause specifying distribution at twenty-one in case the first provision failed. Although the court was asked to apply wait and see to the savings clause,<sup>46</sup> it adhered to the common-law rule and defeated the improperly created class of remainder interests. The court reasoned that the testatrix knew the danger of remoteness and was aware that "what she attempted would succeed so long as her will was not challenged in court." Yet the savings clause was inserted with a

deliberate purpose to violate but, if possible, evade the effect of the rule against perpetuities, and if the rule were ever invoked, to rewrite the rule so that it would be actuated only upon the "happening" of an event which made remoteness an inevitability. But, as we have said, the rule is actuated by the *possibility* of remoteness, and that possibility must be determined as of the date of the testatrix's death.<sup>47</sup>

Two deductions can be drawn from *Hagemann*. First, it is not always lack of sophistication that is at the heart of the failure of an instrument. Second, liberalization of the Rule could lead to its exploitation with the consequences of increased perpetuities and litigation.

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44. The initial impression fostered by wait and see is that it will reduce the amount of litigation in this area of the law. Presumably, once the approach is accepted, attorneys will avoid challenging a document to which it can be applied, at least until the end of the perpetuities period. Issues could resolve themselves in the interim, eliminating the need to go to court at all. The analysis in text accompanying notes 93-94 *infra* indicates that such a theory may be overly optimistic.

45. 218 Va. 333, 237 S.E.2d 388 (1977).

46. 237 S.E.2d at 391.

47. *Id.* at 392 (emphasis in the original).

*Placing the Rule into Proper Historical Perspective*

The *Draft* is self-contradictory in its discussion of the Rule's rationale. In support of a new approach that will retain more perpetuities than were allowed in the past, it puts forth what appear to be good justifications for discouraging perpetuities. These are: 1) to provide a balance between the desires of the current owner of property to exercise control over its use after his death and a future owner's ability to freely dispose of it; 2) to promote the utilization of the wealth of society by permitting its circulation through sale and resale; and, 3) to keep property responsive to the needs of its living owners.<sup>48</sup>

As historical support for maximizing perpetuities, the *Draft* refers to a recent reexamination of the rationale underlying the Rule by George L. Haskins.<sup>49</sup> It interprets Haskins' thesis to be that historically, the Rule was created as one intended to encourage perpetuities. The *Draft* concludes that the Rule's beginnings according to Haskins, and the way it presently operates, permitting the creation of valid future interests that may not vest for as long as a hundred years, are "some indication that the rule is a rule *for* perpetuities."<sup>50</sup> It is true that Haskins rejected the traditional notion that the Rule was originally formulated for the purpose of promoting alienability of property. However, Haskins specifically states that at its inception the Rule was "not a rule *for* perpetuities, but a rule *of* perpetuities."<sup>51</sup>

Haskins analyzed *The Duke of Norfolk's Case*,<sup>52</sup> which first announced the elements of the Rule Against Perpetuities in light of new socio-economic views of seventeenth century England. He characterized the era as dominated by landed gentry concerned with preservation of the property it had acquired, not with the ready alienability that would have been fostered by a mercantile, capitalist society.<sup>53</sup> The compromise between the particularized needs of this class and the heretofore tradi-

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48. *Draft*, *supra* note 1, at 10-11.

49. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977).

50. *Draft*, *supra* note 1, at 13 (emphasis added).

51. Haskins, *supra* note 49, at 44 (emphasis added).

52. 22 Eng. Rep. 931 (1682). Two earlier cases, *Manning's Case*, 8 Co. Rep. 94b (1609) and *Pells v. Brown*, Cro. Jac. 590 (1620) had recognized the validity of two types of indestructible future interests. *Draft*, *supra* note 1, at 8-9 and Haskins, *supra* note 49, at 32-35.

53. Haskins, *supra* note 49, at 22.



tional conservatism of English courts, which had favored maximization of alienability, gave birth to a "rule of perpetuities."<sup>54</sup> The case permitted tying up land for a perpetuity limited to one lifetime or possibly two, by holding valid a springing executory interest in a third son that was conditioned upon the death of the eldest son within the lifetime of the second-born.<sup>55</sup>

If the birth of the Rule was not conceived by sentiment *against* perpetuities, neither was it created as one *for* perpetuities. It is Haskins' contention that the Rule allowed perpetuities, but within limits. Property owners were to be allowed to exercise sufficient control from the grave to protect their accumulated wealth from insane or profligate children, but this control was to end within a period of time calculated to permit alienability, and to free the living after an interim amenable to the needs of society.<sup>56</sup> As the case precipitated further concessions by English judges to the will makers, the period of perpetuities became formally established to require certain fulfillment of conditions within a measuring life plus twenty-one years. In spite of occasional statutory adjustments by individual states, this has remained the permissible common-law period of donative control in most American jurisdictions.

Haskins' work does not provide historical justification for the Rule's expansion or contraction; neither should it be interpreted as encouraging the maximum utilization of the perpetuity period where proper drafting of an instrument does not allow it.

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54. *Id.* at 44.

55. The Earl of Arundel and Surrey created two trust indentures for a term of 200 years after reserving life estates to himself and his widow, with remainders to his younger children. The income from the barony of Grostock was to go to the Earl's second son, Henry and his issue, during the life of the eldest son Thomas; but if Thomas, who was insane, should die without leaving issue in the lifetime of Henry who would then become the earl by inheritance, the rents and profits from the barony were to go to the third son, Charles.

The issue arose when, upon the death of Thomas, Henry tried to consolidate both his brothers' interests in himself by terminating Charles'. Charles brought a bill in Chancery to demand the Grostock income now that the conditions to his taking had been fulfilled. Henry resisted on the ground that the gift to Charles was in the nature of a perpetuity and hence void. *Id.* at 36-37.

56. "Admittedly, Charles' interest in the term for years was not destructible, but neither should it be void because Charles' interest would 'wear itself out' in a single lifetime." *Id.* at 44. "Charles' interest would take effect, if at all, within Thomas' lifetime and hence there existed no perpetuity." *Id.* at 45.

*Social Implications of Wait and See*

Formulation of the second Restatement began with a revision of the Rule Against Perpetuities as it is applied to donative transfers because it is the foundation of estate planning, setting perimeters on the control that owners are permitted to exercise in the disposition of their property after death. The *Draft* does not address commercial transactions directly at this point, although they could be affected where their long-term nature invoked the sanction of the Rule. It is important to note that courts analyze commercial transactions in the light of the arms-length bargaining upon which they initially were based; but in interpreting a donative transfer, they look to effectuating the intent of one person often long dead. It is appropriate that in the latter case they be influenced by the additional considerations of the needs of the living at the time of litigation and the exigencies of society. For this reason, strict application of the Rule, in order to free property from unnecessary, long-term restriction, may be more vital to donative transfers than commercial ones. While the latter are confronted with an initial two-sided examination by the contracting parties, the donor's wisdom as it affects the individual needs of others and the general economic requirements of society several years later is questioned only by the few limits the law has imposed and the amount of discretion a court is willing to exercise. How strictly the Rule's limits are applied is a manifestation of current attitudes toward controls on property disposition.

Wait and see puts the law's imprimatur even more firmly upon the concept that is commonly called "dead-hand" control, for the measure of a life and twenty-one years thereafter. That much the law has allowed until now. A reformative technique like wait and see is injected as an issue where intent would not necessarily have been in direct conflict with the law's limits but for its incorrect expression. In such cases, the possibilities' approach to the interpretation of an instrument defeats it immediately upon challenge, while wait and see allows intent some leeway to the extent of the time needed to see what in fact does happen. The result is that wait and see will expand the number of instances where the Rule is allowed to restrict free and immediate use of property. It is not a radical extension of the time period that is being proposed, merely that the full period be permitted regardless of how an instrument is drafted. Even this much is a radical innovation.

When a contract is poorly drawn, its chances of being up-

held must suffer. A donative instrument is, in a sense, a contract with society. Society has imposed certain restrictions upon transfers and rules for carrying them out. Until now, those rules have been strictly enforced in most states, perhaps because the period of the Rule Against Perpetuities is an outer limit reluctantly set. This policy is conceded within the *Draft* itself:

The objections to the adoption of the wait-and-see approach in determining the validity of non-vested interests under the rule against perpetuities are based on the problems allegedly created by the uncertainties as to the ultimate ownership of property during the period of waiting and seeing what happens. This is not an objection to the wait-and-see approach; it is an objection to the length of the period of the rule.<sup>57</sup>

Rather than loosen the reins on a horse headed in a questionable direction, is it not better to stop for another look at the map? The socio-economic questions involved in the present time limitations of the Rule should be reexamined with an eye toward setting firm priority upon either the free disposition of property or encouraging restraints upon alienation.<sup>58</sup> It is not evident that this has been done even in California, as this state's reform gained impetus from difficulties with the Rule in

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57. *Draft*, *supra* note 1, at 17. These objections are based on the fact that the best use of property may not be made during the hundred years that it is held for non-vested interests:

It is at least questionable whether the period of the rule is on a sound basis today, particularly when applied to legal interests in land. The period of the rule may keep land out of the channels of commerce, where legal non-vested interests in land are created, for over one hundred years. That may be too long in our modern society.

Equitable non-vested interests under a trust do not affect the power of the trustee to alienate the trust property itself, but do tend to keep the beneficial flow from trust investments along predetermined lines for the period of the rule, which again may be for a period of over one hundred years.

*Id.* at 26 n.1. But wait and see ties up property which could have been released, even if only through the fluke of an improperly drafted instrument.

58. In light of changed attitudes toward property rights in recent years, some issues that have been suggested and should be firmly resolved before a new direction is undertaken include whether: the old should be allowed monetary influence over the lives of three generations even after death; trust interests in the country should be assured of keeping capital under their control for the full term of the Rule; it is beneficial to further the conservative investments of these trustees rather than give up an estate to daring or careless hands; the rewards of owning property should go to those who use it best; property ill-used is best dispersed.

commercial transactions.<sup>59</sup>

Finally, the peculiar problems posed to individuals by wait and see, and the behavioral attitudes it fosters, have been ignored. Property interests that would otherwise fail have the opportunity of being saved after a wait of a life and twenty-one years. To some individuals it may be better to wait out this time to see if property will be inherited than to lose it immediately. But what are the psychological consequences of waiting around for a possible inheritance, or for that matter, of not getting it in the end? Particularly distasteful is the notion that the period may be spent waiting for someone to die or not be born.

### *Summary*

The *Draft* avoids examination of social issues underlying the Rule and misapplies old doctrines. Whenever courts have allowed some leeway into their otherwise relentless adherence to the Rule, it has consisted of a mere common-sense admission that ignoring past events is unrealistic. It has never been part of the common law to permit violations of the Rule to be resolved by the occurrence of future events. Desirability of ameliorating the effects of unskilled draftsmanship should be weighed against the alternatives of prolonged perpetuities and possible manipulation of the Rule. The Rule's origins dictate a compromise between those who desire to protect their property and the law's disdain for restraints against alienation. Proposal of wait and see has not been accompanied by sound arguments in its favor.

### PERPETUITIES LAW IN CALIFORNIA AND THE CY PRES DOCTRINE

A review of perpetuities law in California has a two-fold purpose in the present context. One is to illustrate the inevitable conflict between a state's legislated reform and the proposed common-law doctrine, wait and see. The second purpose is to show that where a reform of the Rule Against Perpetuities is mandated, *cy pres*, as it is implemented in California, is a viable alternative that provides immediate results.

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59. See *Haggerty v. City of Oakland*, 161 Cal. App. 2d 407, 326 P.2d 957 (1958) and the discussion of perpetuities law in California. See text accompanying notes 77-82 *infra*.

*California's Statutory Conflict*

Should wait and see become the prevailing common-law method of applying the Rule, California's response to the new approach will be complicated by the fact that some of its own relevant statutes have not yet been construed. In addition, it is difficult to predict the direction the courts will take if an instrument is capable of being interpreted under both common-law and statutory doctrine. Examination of the pertinent statutes and cases provides an unsatisfactory result, as the only clear indication to surface is that wait and see might well have an unpredictable impact upon the law of this state.

*The basic contradiction.* California perpetuities law was rooted in its constitution and has been developed by the legislature.<sup>60</sup> The common-law period of the Rule Against Perpetuities<sup>61</sup> and its conception of vesting were adopted by California in 1951<sup>62</sup> as Civil Code section 715.2:

No interest in real or personal property *shall be good* unless it *must* vest, *if at all*, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section *to make effective in this State the American common-law rule against perpetuities.*<sup>63</sup>

Should the wait-and-see approach gain acceptance as the American common-law Rule Against Perpetuities, California courts will have to decide if this section requires that the *new* common-law rule be made effective. Yet, section 1.4 of the

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60. CAL. CIV. CODE § 715 (West Supp. 1978) replacing CAL. CONST. art. XX, § 9 (1879) (repealed 1970).

61. Perpetuities are allowed for charitable purposes, CAL. CIV. CODE § 715 (West Supp. 1978) (added 1970); insurance trusts, CAL. CIV. CODE § 715.4 (West Supp. 1978) (added 1959); and state retirement trusts, CAL. CIV. CODE § 715.3 (West Supp. 1978) (added 1951, amended 1959).

62. For a history of the development of the Rule in this state, see Fraser & Sammis, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities*, 4 HASTINGS L.J. 101 (1953). For a discussion of California perpetuities law from 1951 to the enactment of the 1963 legislation and following, see Simes, *Perpetuities in California Since 1951*, 18 HASTINGS L.J. 247 (1967).

63. CAL. CIV. CODE § 715.2 (West 1954)(emphasis added).

*Draft*<sup>64</sup> cannot be reconciled with the first sentence of the statute. The meaning of the emphasized words in combination with the date of the statute's adoption testify that the legislature intended "to make effective" the possibilities approach to the Rule, as that was the common-law rule in 1951.

*Court rejection of wait and see.* California has persistently resisted the application of wait and see in determining the validity of a disposition.<sup>65</sup> This resolve was most recently reaffirmed by the *in re Estate of Ghiglia*<sup>66</sup> court:

The determination as to whether a future interest vests within the time allowed is made as of the moment the instrument containing the limitation speaks; we are not permitted to wait and see what happens in order to determine its validity.<sup>67</sup>

Section 715.2 and the cases would seem to foreclose any encroachment by wait and see upon California law. Key amendments designed to deal with the harshness of the common-law approach, however, were added in 1963.<sup>68</sup> Two of them require explanation in light of the new Restatement policy.

#### *Shades of wait and see in California?*

The more liberal attitude of the Restatement could influence California's decision regarding one of the legislature's 1963

64. "[A] donative transfer of an interest in property fails, if the interest does not vest . . . within the period of the rule against perpetuities." Draft, *supra* note 1, at 66.

65. "[I]t is not permitted to wait to see what happens in a disposition to determine the validity or invalidity of the trust," Kober Trust Fund, 26 Cal. App. 3d 265, 271, 103 Cal. Rptr. 1, 5 (1972); "not permitted to wait to see", Estate of Gump, 16 Cal. 2d 535, 547, 107 P.2d 17, 23 (1940); "the statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity . . . results." Sheean v. Michel, 6 Cal. 2d 324, 327, 57 P.2d 127, 129 (1936); "provisions . . . do not permit us to wait and see what happens in order to determine the validity or invalidity of the limitation," Estate of Troy, 214 Cal. 53, 57, 3 P.2d 930, 932 (1931); "the statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results," Estate of Steele, 124 Cal. 533, 537, 57 P. 564, 565-66 (1899).

66. 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974).

67. *Id.* at 438, 116 Cal. Rptr. at 830.

68. In addition to the two sections discussed, a provision to deal with the "unborn widow" problem was added, asking courts to make an assumption of fact whether it is true or false:

In determining the validity of a future interest in real or personal property pursuant to Section 715.2 of this code, an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a "life in being" at such time whether or not the individual so described was then in being.

CAL. CIV. CODE § 715.7 (West Supp. 1979)(added 1963).

innovations. Section 715.6 provides an alternate period of sixty years in all (commonly described as a period "in gross"), which could work to lengthen or shorten the perpetuity period in individual cases.<sup>69</sup> The initial reaction to this untested provision, was that it could have been in conflict with the constitutional sanction against perpetuities; but the latter was repealed in 1970.<sup>70</sup> The question remains as to how extensively section 715.6 should be used—whether it needs to be incorporated within an instrument or whether courts will apply the alternate time period in any case to save an otherwise failing interest.

On two occasions, California courts have implied a willingness to wait and see which of the two time periods would permit an interest to become valid. In *United California Bank v. Bottler*,<sup>71</sup> the court speculated:

[Nancy's] life cannot serve as a measure of the period within which interests will vest. Nancy may live more than 21 years after the death of Raymond, and she may outlive the alternative period of 60 years from the date of the creation of the power as permitted by Civil Code, section 715.6.<sup>72</sup>

The *Ghiglia* court expressed a desire for guidance as to how the new section should be applied<sup>73</sup> at the same time it made this observation:

Moreover, the child could be born more than 25 years after the testator's death and would not reach age 35 within 60 years after the creation of the interest under the alternative period in gross provided by Civil Code section 715.6.<sup>74</sup>

Such dicta may imply that courts are willing to validate an interest that vested within either period regardless of how an

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69. *Id.* § 715.6 (West Supp. 1979).

70. Simes, *supra* note 62, at 266. Although the alternative period would not be longer than lives in being and twenty-one years on the average, it could have been contended that the only period in gross recognized by the common law rule is twenty-one years. *Id.* at 261.

71. 16 Cal. App. 3d 610, 94 Cal. Rptr. 227 (1971).

72. *Id.* at 617, 94 Cal. Rptr. at 231.

73. 42 Cal. App. 3d at 441 n.2, 116 Cal. Rptr. at 832 n.2. The court acknowledged the reference to CAL. CIV. CODE § 715.6 (West Supp. 1979) in *United California Bank v. Bottler*, 16 Cal. App. 3d at 617, 94 Cal. Rptr. at 231 and in Note, *California Revises the Rule Against Perpetuities—Again*, 16 STAN. L. REV. 177, 185 (1963), which stated that a choice between the common-law and alternate periods had to be made at the creation of the instrument when it was unknown which period would be longer, because California does not have a wait and see policy.

74. 42 Cal. App. 3d at 440-41, 116 Cal. Rptr. at 832.

instrument is written. This interpretation, however, would not be an application of wait and see as promulgated by the *Draft*. There would be no waiting for the fulfillment of a condition; rather, the court would have to decide whether to permit validity where either of two established standards is met. Such liberality would conform to both California's historic rejection of wait and see and its statutory reform of the Rule.<sup>75</sup>

*The introduction of cy pres in California.* The most significant change in the California law was the 1963 addition of a *cy pres* provision that allows courts, in spite of a specific invalid disposition, to effectuate the general intent of the creator of an interest whenever it can be ascertained. Section 715.5 provides:

No interest in real or personal property is either void or voidable as in violation of Section 715.2 of this code if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.<sup>76</sup>

The 1963 reform was a response to the harshness of the rule as it was manifested in *Haggerty v. City of Oakland*.<sup>77</sup> In *Haggerty*, a lease whose term was to commence upon a date after notice of completion of a building was held void on the ground that there was a bare possibility at the time the lease was executed that the estate granted would not commence within lives in being and twenty-one years. Over a strong dissent that a lease with a reasonable time provision had never been held to violate the Rule<sup>78</sup> the court ruled that it had "no power to consider reasonable probabilities or possibilities, or to consider what has happened after the creation of the interest."<sup>79</sup>

*Haggerty* had caused as much concern in the judiciary as it did in the legislature, for *Wong v. DiGrazia*,<sup>80</sup> a similar lease

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75. Simes' indicated that such interpretation of the provision is possible. Simes, *supra* note 62, at 254-55.

76. CAL. CIV. CODE § 715.5 (West Supp. 1979).

77. 161 Cal. App. 2d 407, 326 P.2d 957 (1958).

78. *Id.* at 424, 326 P.2d at 968 (Bray, J., dissenting).

79. *Id.* at 418, P.2d at 964. CAL. CIV. CODE § 715.8 (West Supp. 1979) (added 1963), the section actually introduced to deal with the difficulties of the Rule imposed upon commercial transactions, was ironically repealed in 1970, having inspired a more comprehensive reform of perpetuities law.

80. 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963).



case, followed on the heels of the new amendments and soundly disapproved its predecessor. The court looked to the Rule's development and reasoned that "it does not facilely operate as to commercial agreements in today's dynamic economy,"<sup>81</sup> for its

basic purpose . . . was to limit family dispositions, and in that context the period of lives in being plus 21 years served as a proper measurement. Only later by an overextension of nineteenth century concepts did the courts apply the rule to commercial transactions.<sup>82</sup>

The court ruled that, although all contingent interests must vest or fail within the period of the Rule, the lessees' interest would vest upon completion of the building and there was an obligation upon the lessors to complete construction within a reasonable period of time. Therefore, the lease of a building under construction, whose term was to commence on notice of completion did not violate the Rule Against Perpetuities where all rights under the agreement arose, and breach was remediable, within a twenty-one year period.

*Commercial considerations changed the rules for donative transactions.* Both *Haggerty* and *DiGrazia* dealt with on-completion lease terms, a relatively new commercial development of the late fifties and early sixties. Unlike the *Draft*, where the starting point is donative transfers, both the legislature and the Supreme Court of California responded to commercial difficulties with the Rule. The *DiGrazia* court was attempting to introduce a note of reason into the interpretation of contracts that it felt should not be defeated on the basis of a technicality that was not the essence of the transaction. Its primary focus was to avoid "a rigid mechanistic operation of the rule"<sup>83</sup> upon commercial leaseholds. This leaves open the question of whether the social ramifications of reforming the Rule as it pertains to donative transfers were fully considered when the reforms on both fronts were enacted. Nevertheless, the *cy pres* provision has been applied by the appellate courts so far with seemingly sensible results.

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81. *Id.* at 533, 386 P.2d at 822, 35 Cal. Rptr. at 247.

82. *Id.*

83. *Id.* at 532, 386 P.2d at 822, 35 Cal. Rptr. at 246.

*Cy Pres is a Viable Doctrine*

*Cy pres* shows promise in California. A review of California's application of the *cy pres* doctrine reveals that it is a workable policy yielding immediate determination of questions regarding property ownership. The three earliest cases in sympathy with section 715.5 and *DiGrazia*, did not need to rely upon the new rules in order to favor donative intent over rigid application of the Rule. While producing an outcome in concert with the new, liberal policy, each decision was in fact supported by use of traditional common-law methods.

*In re Estate of Bird*<sup>84</sup> was resolved, for all practical purposes, by use of the "second look" doctrine. The donee of a power of appointment created a life estate in his children, with the remainder to be distributed to his great-grandchildren, upon the death of the last of the donee's issue who had been alive on the date of his own death. Technically, such a disposition should have been made by the creator of the power, as the date of vesting is as remote as can be validly achieved by an owner of property. However, since only three months had elapsed between the creation and exercise of the power, and none of the measuring lives had changed in the interim, the court looked to the facts and circumstances as of the time of exercise and upheld the donee's disposition.

Similarly, *California Bank v. Bottler*<sup>85</sup> had no need of new authority to attain a result actually based on old policies, including the doctrine of separability. Here, the donee of a power of appointment postponed distribution of the relevant assets until the death of his daughter, who had *not* been alive at the time the power was created, and whose life could not serve to measure the perpetuities period. The court gave the estate to the daughter through an alternate provision of the document in which the power had been created. At the same time, it salvaged the intent of the donee of the power to have his daughter's property held in trust for life—by separating that portion of the donor's will from the invalid provisions.

In *Estate of Grove*,<sup>86</sup> the court invoked section 715.5 to

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84. 225 Cal. App. 2d 196, 37 Cal. Rptr. 288 (1964).

85. 16 Cal. App. 3d 610, 94 Cal. Rptr. 227 (1971).

86. 70 Cal. App. 3d 355, 138 Cal. Rptr. 684 (1977). A disinherited niece challenged a gift distributing corpus to the grandnieces and grandnephews of the testatrix on the ground that the beneficiaries included after-born members of the class in violation of the Rule. Language in the instrument, however, referred to "living grandne-

prevent invalidation of a superseding will and give effect to the clear and ascertainable intent of the testatrix, but there was enough evidence in the language of the second instrument to satisfy a finding that the challenged reference to a class referred to its living members only. Although these cases relied upon *cy pres*, traditional rules of construction could have produced the same results.

It is *Ghiglia*<sup>87</sup> that illustrates the most significant use of the new policy. The court relied upon section 715.5 to justify upholding, for the first time in California, a violation of the Rule Against Perpetuities. A spendthrift trust was attacked by the testator's children on the ground that a class gift of the remainder to his grandchildren (including those born after the testator's death) when the youngest reached thirty-five, would not vest within the period of the Rule. Although the doctrine of separability was well-established in this state, in this case its use would have excluded a member of the class born after the testator's death in order to save the interests of the other members, a result inimical to the testator's intent.

The court reformed the will, upholding the spendthrift trust and saving the interests of all grandchildren by advancing the date of vesting from thirty-five to twenty-one years of age. It stated:

Of particular importance in the present case is CC § 715.5. While we have been unable to find a California case applying the statute to uphold a testamentary disposition in violation of the rule against perpetuities, courts in other jurisdictions have taken such an approach.<sup>88</sup>

In spite of the availability of the *cy pres* statute, the court looked to outside authority to support its utilization for radical reformation of a will, an indication that traditional common-law principles may still predominate here. If so, the possibility exists that wait and see can have a significant impact.<sup>89</sup> Where the Restatement approach and section 715.5 are not in conflict, it is difficult to predict where the courts will turn first.

Will the new approach be used at least to supplement the California statute? In that case, the effect could be the imposi-

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phews and grandnieces of myself" and gave \$100 to each child born before the date of her death. *Id.* at 363, 138 Cal. Rptr. at 688.

87. 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974).

88. *Id.* at 442, 116 Cal. Rptr. at 832-33.

89. It was specifically rejected in this case. *Id.* at 438, 116 Cal. Rptr. at 830.

tion of a wait to see if a donor's intent is effectuated within the period of the Rule with reformation of an instrument delayed until the end. The most pronounced consequence of such a policy would be prolonged fettering of property and uncertainty as to its ownership. California has adopted what seems to be a workable statute and made its peace with the Rule. Will it allow its own compromise to be tested by the rigors of time, or will it bow to the recommendations of the second Restatement? Following the latter course would be taking a step backwards.

*Advantages of cy pres over wait and see.* *Cy pres* may have been excluded from consideration by the writers of the second Restatement because the doctrine is considered too radical a change. By comparison, wait and see is seen as a more conservative approach.<sup>90</sup> But, in order to make wait and see an effective, sensible doctrine, *cy pres* is often required anyway; that is why it is incorporated as section 1.5 of the *Draft*.<sup>91</sup> The inclusion disregards the arguments against *cy pres* centering on the courts' disdain for rewriting documents. If courts are to search for a manifestation of a donor's intent and to compromise it within the limits of the Rule anyway, what relevance has wait and see to the overall objectives of this process except to postpone it? Those who will benefit most from such a wait are the trust interests who will be assured of retaining the corpus of all improperly disposed estates for the full period of the Rule.

*Cy pres* encourages a more efficient use of the doctrine of separability. A subsequent separation of subject matters or shares may not be in harmony with a donor's original plans for all portions of his property and all possible recipients. Wait and see is basically inconsistent with the notion that the doctrine of separability must be used with skill so as not to defeat the donor's overall objective,<sup>92</sup> because it permits only those interests which can pass the test of time to be saved. *Cy pres* allows a court to assume the testator's viewpoint and, for example, decide whether to imply an interest in a member who would otherwise lose it, or to eliminate a gift to a class as a whole because the laws of intestate succession produce fairer results. Such equity was among the purposes of adding section 1.5 to the *Draft*,<sup>93</sup> but the prior application of wait and see unneces-

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90. AMERICAN BAR ASSOCIATION, *supra* note 5, at 43.

91. *Draft*, *supra* note 1, at 108.

92. California courts strive to adhere to such a policy of skillful application. See *In re Estate of Ghiglia*, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974).

93. *Draft*, *supra* note 1, at 112-13.

sarily clutters a sensibly developed doctrine.

Although wait and see might postpone or eliminate some litigation, the common case where an age contingency is attached to a class gift is a good example of the type of situation where the proposed policy only complicates matters. The simpler solution is to merely reduce the age requirement to twenty-one immediately. Compare the results, in fact situations similar to that of *Ghiglia*,<sup>94</sup> by applying the two methods. *Cy pres* allowed the court to endorse the validity of a disposition consisting of a spendthrift trust with remainder to vest in the grandchildren by adjusting the age requirement to twenty-one. The grandchildren in the *Ghiglia* case were adults at the time of the decision, so they will receive the remainder immediately at the end of the last life estate. Had the grandchildren been younger at the time of litigation, or if an additional grandchild is born during the life estate period, the remainder will be distributed when the youngest reaches age twenty-one. Litigation was required in this case to achieve a result in harmony with donative intent and the precepts of the Rule. However, it is possible it can be avoided in similar cases in the future as the application of the *cy pres* statute becomes more predictable.

Interjecting wait and see delays the certainty of this outcome and the release of the property in question. Upon the end of the last life estate, assuming no additional births, the adult grandchildren in *Ghiglia* would have to wait until they reached the age of thirty-five to receive the remainder. If they were under the age of fourteen, or had another grandchild been born within the life estate period, a wait of up to twenty-one years would be imposed to see if all these youngsters died, thus leaving a valid disposition with no need for litigation to those who are thirty-five. (Even here, litigation could be necessary if the dead grandchildren left unprovided-for issue.)<sup>95</sup>

The more likely (and optimistic) eventuality is that one or more of such young children could be living and between twenty-one and thirty-five years old at the end of the perpetuity period. At this point the question of validity would arise and would have to be resolved by use of California's section 715.5 and the *cy pres* section (1.5) of the *Draft*. For the advantage of avoiding litigation in an indeterminate number of cases, alien-

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94. 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974).

95. See CAL. PROB. CODE § 90 (West 1956); Estate of Gardner, 21 Cal. 3d 620, 580 P.2d 684, 147 Cal. Rptr. 184 (1978).

ability and an immediate, clear-cut solution are postponed.

*Cy pres* is a better way to reduce both the number of suits and also to improve the quality of motives for bringing them. Challengers will hesitate to bring inconsistent claims knowing that courts will reform an instrument to support donative intent as well as the Rule. Wait and see begs the issue by holding property and individuals in limbo to see if time will validate an improperly structured instrument.

#### CONCLUSION

Development of the law is often a gradual and natural response to the needs of society. When reform is deliberately imposed, however, it is necessary to reexamine contemporary values to make certain the proposed change conforms to them. Before the wait-and-see approach is allowed to prolong perpetuities that would have been invalidated, the desirability of retaining perpetuities in the form of a rule hundreds of years old should be carefully reevaluated.

California's law is presently in conflict with the wait-and-see policy of the second Restatement. Furthermore, its own *cy pres* doctrine is being sensibly applied with satisfactory results. The recommended course for this state is to ignore wait and see altogether.

Where it is determined that reform of the Rule Against Perpetuities is desired, *cy pres* appears to be the best alternative. It eliminates confusion, avoids delay, and permits immediate, intelligent resolution of problems created decades ago on the basis of present-day requirements.<sup>96</sup>

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